

1 UNITED STATES BANKRUPTCY COURT
2 FOR THE SOUTHERN DISTRICT OF NEW YORK
3 Case No. 09-14884 (JMP) (Jointly Administered)
4 - - - - -x
5 In Re:
6 LEHMAN BROTHERS HOLDINGS, INC., et al.
7 (Main Case 08-13555)
8 - - - - -x
9 D. GEOFFREY HUNTER and DAN SCHWARZMANN, as
10 Joint P and Lehman Brothers Finance AG, in
11 Liquidation
12
13 Debtors.
14 - - - - -x
15 United States Bankruptcy Court
16 One Bowling Green, Room 602
17 New York, New York, 10004-1408
18
19 March 21, 2012
20 10:04 AM
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22 B E F O R E:
23 HON. JAMES M. PECK
24 U.S. BANKRUPTCY JUDGE
25 ECR OPERATOR: EMMANUEL

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Motion Filed by the Joint Provisional Liquidators of Lehman RE Ltd. For Authorization and Approval of the Settlement Between Lehman RE Ltd. And the Lehman U.S. Debtors.

Motion Filed by the Debtors' for Approval of a Settlement Agreement with Lehman RE Ltd and Certain Other Parties.

Motion of Lehman Brothers Holdings Inc. For Authority to Use Non-Cash Assets in Lieu of Available Cash as Reserves for Disputed Claims Pursuant to Section 8.4 of the Debtors Confirmed Joint Chapter 11 Plan [ECF No. 24726].

Motion of the Joint Provisional Liquidators of Lehman RE Ltd. For Authorization and Approval of the Settlement Between Lehman RE Ltd. And the Lehman U.S. Debtors [ECF No. 130].

Michigan State Housing Development Authority v. Lehman Brothers Derivative Products Inc., et al. [Adversary Proceeding No. 09-01728].

Turnberry Centra Sub, LLC et al. v. Lehman Brothers Holdings Inc. [Adversary Case No. 09-01062].

Lehman Brothers Holdings Inc. v. Fontainebleau Resorts, LLC, et

1 al. [Adversary Case No. 10-02821].

2

3 Lehman Brothers Holdings Inc. v. Fontainebleau Resorts, LLC, et

4 al. [Adversary Case No. 10-02823].

5

6 Motion of Fidelity National Title Insurance Company to Compel

7 Compliance with Requirements of Title Insurance Policies [ECF

8 No. 11513].

9

10 Motion of Giants Stadium LLC for Leave to Conduct Discovery of

11 the Debtors Pursuant to Federal Rule of Bankruptcy Procedure

12 2004 (ECF No. 16016].

13

14 Motion of Monti Family Holding Company, Ltd for Leave to

15 Conduct Rule 2004 Discovery of Debtor Lehman Brothers Holding,

16 Inc. and Other Entities [ECF No. 16803].

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18 Motion of Jason T. Taylor for Relief from the Automatic Stay

19 [ECF No. 14377].

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21 Motion of Phillip Walsh for Relief from the Automatic Stay [ECF

22 No. 14571].

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24 Amended Motion of Ironbridge Homes, LLC, et al. for Relief from

25 the Automatic Stay [ECF No. 23551].

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2 Motion of Edward J. Agnostini, et al. for Relief from the
3 Automatic Stay [ECF No. 24769].
4

5 Belmont Park Investments Pty Ltd., et al. v. Lehman Brothers
6 Special Financing Inc., et al. [Adversary Proceeding No. 12-
7 01045].
8

9 Lehman Brothers Holdings Inc., et al. v. Citibank, N.A., et al.
10 [Adversary proceeding No. 12-01044].
11

12 Cardinal Investment Sub I, L.P. and Oak Hill Strategic
13 Partners, L.P.'s Motion for Limited Intervention in the
14 Contested Matter Concerning the Trustee's Determination of
15 Certain Claims of Lehman Brothers Holding Inc. and Certain of
16 Its Affiliates [LBI Docket No. 4634].
17

18 Motion to Compel Compliance with Subpoena Duces Tecum [ECF No.
19 24602].
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25 Transcribed by: Donald Cohen

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P R O C E E D I N G S

THE COURT: Be seated, please. Good morning.

MR. HORWITZ: Good morning, Your Honor. Maurice Horowitz, Weil, Gotshal & Manges for the debtors.

The first item on today's agenda is the motion of the debtors seeking authorization to enter into a settlement agreement between, on the one hand, the debtors and two of their non-debtor affiliates, Lehman Ali Inc. and Appalachian Asset Management Corp, and on the other hand, Lehman RE Limited, the debtors' Bermuda affiliate, its subsidiary, Congress Life Insurance Company, and Pulsar RE Limited, which is one of Lehman RE's creditors. Lehman RE has filed a concurrent motion in its Chapter 15 case, which is item 3 on today's agenda. Given that the two motions deal with the same transaction we would propose that we address those two concurrently as well.

THE COURT: That's sensible.

MR. HORWITZ: Okay. The settlement agreement is the product of more than two years of extensive negotiations between the parties. It resolves in particular two claims that were the subject of likely litigation. One is Lehman RE's claim against LBHI, which is based on the net worth maintenance agreement between Lehman RE and LBHI dated October 26, 2007, and Lehman RE's claim against LCPI based on a master repurchase agreement between, among other parties, Lehman RE and LCPI

1 dated July 9, 1999.

2 Pursuant to the settlement agreement, Lehman RE will
3 have an allowed unsecured affiliate claim against LBHI in the
4 amount of \$450 million, and LC -- Lehman RE will have a claim
5 against LCPI in the amount of \$490 million based on the MRA.
6 The resolution of these two claims alone, Your Honor, has
7 resulted in a reduction of Lehman RE's claims against the
8 debtors from \$2.3 billion to \$1 billion in allowed claims.

9 In light of the multitude of legal issues attendant
10 to these claims, all of which are set forth in detail in our
11 papers and in the declarations of Mr. Daniel Ehrmann and
12 Jeffrey Fitts, both of whom are present in the Courtroom, the
13 debtors have concluded that these amounts represent a fair and
14 reasonable compromise of Lehman RE's claims against LBHI and
15 LCPI and adequately reflect the obligations of these debtors to
16 Lehman RE.

17 The settlement also fixes and allows Lehman RE's
18 claims against two other debtors, LBCC and LBSF. The claim
19 against LBCC is based on certain foreign exchange transactions.
20 That claim will be allowed as an unsecured affiliate claim in
21 the amount of 86 -- \$87.6 million and the claim against LBSF,
22 which is based on swap transactions based on an ISDA Master
23 Agreement will be allowed as an unsecured claim in the amount
24 of approximately \$25.4 million. Your Honor, unlike the claims
25 against LBHI, these two claims were not controversial claims,

1 but they are, nevertheless, the result of two years of
2 extensive reconciliation of the debtors' books and records with
3 Lehman RE's books and records.

4 The settlement also resolves a dispute which is
5 described in the motion concerning the allocation of certain
6 tax benefits and liabilities among the debtors, Lehman RE and
7 Congress Life. To resolve the dispute the parties have agreed
8 that Lehman RE, on its behalf and on behalf of Congress Life,
9 will have the right to utilize up to \$150 million of net
10 operating losses incurred by LBHI and LCPI, provided that, for
11 2008 onward, Lehman RE and Congress Life abide by the terms of
12 the debtor allocation agreement that is incorporated into the
13 plan. This agreement among other things, deals with the
14 allocation of commonly held tax benefits and liabilities among
15 the debtors.

16 The NOLs that Lehman RE and Congress Life will be
17 entitled to constitute approximately less than half of one-
18 percent of the NOLs that are available to the debtors. As
19 such, as stated in the motion, the debtors do not believe that
20 this reallocation of NOLs will have any detrimental effect on
21 them.

22 In addition to mutual releases between the parties,
23 the settlement agreement contains a mutual release between the
24 Lehman U.S. parties and Pulsar RE Limited and provides for the
25 elimination of certain litigation that has been commenced by

1 Pulsar RE against LBHI and LCPI.

2 Finally, Your Honor, pursuant to the settlement
3 agreement LCPI has agreed to purchase certain loans from Lehman
4 RE with an aggregate principal balance -- outstanding principal
5 balance of approximately \$313 million, free and clear of all
6 liens, claims, and encumbrances for an aggregate purchase price
7 of \$32 million. As stated in the motion these loans are among
8 the loans that LCPI originally sold to Lehman RE pursuant to
9 the master repurchase agreement and therefore had been
10 carefully analyzed by LCPI in connection with determining
11 Lehman RE's claim against LCPI. The price that LCPI has agreed
12 to pay for these loans is based on this analysis and in LCPI's
13 business judgment represents a fair price, particularly when
14 combined with the favorable resolution of Lehman RE's claim
15 against LCPI. Moreover, Your Honor, LCPI is essentially a
16 strategic purchaser of these loans in the sense that it is
17 already invested in the capital structure of the assets that
18 underlie many of these loans. For this reason, if LCPI has
19 the opportunity to manage these loans it believes it will
20 realize a substantial profit from a proactive management of the
21 loans.

22 Your Honor, the creditors' committee has filed a
23 statement in support of the motion. In addition there have
24 been no objections filed to the motion. I would also note that
25 one of the conditions precedent to the effectiveness of the

1 settlement agreement was the approval -- or is the approval of
2 the settlement agreement by the Bermuda Court that oversees
3 Lehman RE's provisional liquidation. That order has been
4 entered and was attached to Lehman RE's papers. In light of
5 these developments the debtors in Lehman Re filed on Monday a
6 revised proposed order that includes a waiver of the 14-day
7 stay required by Bankruptcy Rule 6004(h) to enable the parties
8 to proceed to closing if this Court approves the settlement.

9 Unless Your Honor has any questions, the debtors
10 request entry of the order approving the motion.

11 THE COURT: Just a few questions.

12 This is obviously a comprehensive and integrated
13 settlement. Are there any open issues that have not been
14 resolved between the parties by virtue of this settlement
15 agreement? In other words, is anything left over?

16 MR. HORWITZ: Between Lehman RE and the debtors
17 there are no more open issues. The -- and all the other issues
18 between the other parties to the settlement, the non-debtors
19 and Lehman RE's subsidiaries are mostly resolved. The only
20 unresolved -- the only matters that have not been resolved by
21 this settlement are any claims that Pulsar RE's affiliates may
22 have against the debtors. Those have been carved out of the
23 settlement, and the debtors -- any defenses and claims that the
24 debtors may have against those affiliates are carved out. It
25 didn't need to be in the motion -- I mean the settlement, but

1 that has not been resolved by the settlement.

2 THE COURT: All right.

3 And I'm just going to ask what is really a
4 theoretical question that came up in the context of another
5 settlement in which I had Chapter 11 debtors on one side and a
6 Chapter 15 entity on the other side -- that was Lehman Brothers
7 Bankhaus. And I recognize that there are differences between
8 the Bankhaus settlement and the comprehensive settlement that
9 we have here, but I would like a showing that this is, in fact,
10 good for both sides.

11 MR. HORWITZ: As in -- well, both declarants are
12 present in the Courtroom today and can the questions --

13 THE COURT: Then I can probably draw that reasonable
14 inference because both Lehman and Lehman RE are moving jointly
15 at the same hearing for approval of a settlement, and Lehman
16 RE's part of the transaction has already been approved by the
17 Bermuda Court. It almost speaks for itself, but from a
18 business perspective it would be useful for me to hear how this
19 actually works out well for both sides of the transaction.

20 MR. HORWITZ: Your Honor, is your question directed
21 at the purchase that -- LCPS purchase of the loans from Lehman
22 RE or at the settlement of the claims between the debtors and
23 Lehman RE?

24 THE COURT: It's not parsed; it relates to the
25 entirety of the transaction that's presented because I view it

1 as an integrated transaction. If it should be more properly
2 viewed in parts, I can view it in parts. Up to you.

3 MR. HORWITZ: I can address the purchase of the
4 loans first, because that is a very similar situation to the
5 purchase that the Court alluded to, the purchase of loans from
6 Bankhaus, which was also between two debtors.

7 THE COURT: Right.

8 MR. HORWITZ: Just like in that settlement, in this
9 case these are loans that are of greater value to LCPI than to
10 Lehman RE because of LCPI's -- the strategic benefits that LCPI
11 will get from the loans. So the price that has been agreed to
12 is a price that both sides believe is a fair price for the
13 loans, but LCPI believes that its -- it will have the ability
14 to maximize the value of those loans better than Lehman RE
15 does.

16 The purchase -- the price that was agreed to for
17 those loans was related to the claim that LCPI has agreed to
18 with Lehman RE. So it wouldn't necessarily have been the same
19 claim amount that was agreed to if LCPI did not have the
20 ability to purchase these loans for this price.

21 THE COURT: All right.

22 MR. HORWITZ: In terms of the net worth maintenance
23 agreement that the --

24 THE COURT: Will the senior partner who's jumping
25 down your back wants to say something either to you or to me.

1 MR. KRASNOW: One thing to put in context, Your
2 Honor, is that there is a significant difference since I was
3 more involved with the Bankhaus, which your Honor was alluding
4 to -- it's Richard Krasnow from Weil, Gotshal & Manges -- is
5 unlike the Bankhaus settlement, while the purchase of these
6 assets does have an impact with respect to the claims, just by
7 looking at the numbers of attendant to the claims that are
8 being allowed here and the purchase price, while it is an
9 integrated settlement, clearly and it's all in one agreement,
10 the purchase of the assets, while a component of the claims,
11 are really a relatively minor component of the claims as is
12 reflected by the fact the purchase price is \$30 million and the
13 claims that are allowed with respect to LCPI and LBHI are over
14 \$400 million each.

15 So, they are integrated, they are related, there is
16 an impact on those allowed claims vis a vis the purchase of the
17 assets, but it is not as material as it was in the Bankhaus
18 scenario, where that was -- played a very significant role in
19 calculating the claim. That's the only thing I wanted to --

20 THE COURT: Correct

21 MR. KRASNOW: -- help Mr. Horowitz, on that one
22 aspect.

23 THE COURT: It was a -- that was an elegant
24 interruption.

25 MR. KRASNOW: Thank you, Your Honor.

1 MR. HORWITZ: The other two -- the other major claim
2 that's being settled by this settlement agreement, the claim
3 that arises from the net worth maintenance agreement is a claim
4 that would have been subject of very uncertain, very
5 protracted, extensive fact-intensive litigation between the
6 parties, and neither party really preferred to engage in that -
7 - or go down that road. Part of it -- even though the
8 agreement itself is not an uncommon agreement in Bermuda -- at
9 least that's my understanding -- the application of the
10 agreement in these circumstances, which by any measure are not
11 typical, where both parties are in bankruptcy and where the
12 insurance company, while it has a balance sheet, has not yet
13 called for claims in its own case, would have raised issues
14 under Bermuda law and under U.S. law that would have required
15 extensive litigation. Both parties consulted extensively with
16 their Bermuda counsel and have reached the claim amount that
17 they have agreed to, in part based on an assessment of the
18 legal risks and in part through two years of negotiations over
19 what Lehman RE's true liabilities are in these circumstances.

20 THE COURT: I'm satisfied by what you've said that
21 this is a transaction that from the debtors' perspective is,
22 not only integrated but beneficial. I'd be interested in
23 hearing a comparable showing from counsel on behalf of the
24 foreign representative of Lehman RE. Mr. Petrick, are you
25 prepared for that?

1 MR. PETRICK: Yes, Your Honor.

2 Good morning, Your Honor. Gregory Petrick of
3 Cadwalader, Wickersham & Taft on behalf Garth Callow (phonetic)
4 and Dan Schwarzmenn, the joint provisional liquidators of
5 Lehman RE.

6 Your Honor, there is a parallel application for
7 approval of the settlement in Lehman RE's Chapter 15
8 proceeding. As Mr. Horwitz has mentioned, the settlement has
9 previously been approved by the Bermuda Supreme Court which is
10 the venue of the main proceeding. In the Courtroom today with
11 me, Your Honor is Dan Schwarzmenn, one of the joint provisional
12 liquidators. He has functioned in that capacity since July
13 2010 and has been the principal architect and negotiator with
14 his counterparts on the LBHI side with respect to the
15 settlement.

16 Your Honor, I can do this as a presentation or as a
17 proffer of Mr. Schwarzmenn's testimony, if he were called --
18 however you would like to do it.

19 THE COURT: Well, since this is an uncontested
20 proceeding, and I don't think there's a need for an evidentiary
21 record beyond what has already been shown in the pleadings
22 let's simply view this as informal colloquy --

23 MR. PETRICK: Sure.

24 THE COURT: -- in which you're providing me with the
25 comfort that I seek that this is, in fact, beneficial on both

1 sides. And all I'm really seeking from you is that reassurance
2 with such references to the record as you think appropriate.

3 MR. PETRICK: Thank you, Your Honor.

4 Your Honor, I agree with Mr. Horwitz that this
5 settlement is a comprehensive, complex resolution. It was
6 negotiated over an extended period of time and it was very much
7 an arm's length negotiation with give and take on both sides.
8 I think that there are several features of the settlement which
9 are important to our estate. First off, Your Honor, it
10 resolves four claims of Lehman RE into the Lehman estates. One
11 is a -- two of them -- a claim against LBSF under a swap
12 agreement and a claim against LBCC under inter-company
13 transactions, were relatively easy to resolve as a matter of
14 reconciling books and records claims. And that fell in place
15 pretty quickly.

16 The other two claims, a claim under a net worth
17 maintenance agreement and a claim under the master repurchase
18 agreement, were the subject of substantial debate and
19 controversy. The collateral that was transferred to Lehman RE
20 -- and Lehman RE transferred \$715 million to LCPI in exchange
21 for collateral that consisted of 23 commercial property loans,
22 all property in the United States, and a portfolio of
23 residential mortgages that at one time was as high as 800
24 loans. The commercial loan portfolio represented undeveloped
25 land in Nevada, California, mezzanine loans on properties in

1 New York, some development properties in Turks and Caicos -- a
2 real assortment of highly illiquid and very hard-to-value
3 loans. The central issue was to figure out the claim under the
4 master repurchase agreement was valuing that collateral as of
5 the date of default of September 18, 2008. From the Lehman
6 side -- from the Lehman RE side, we engaged in a very
7 comprehensive process to come up with the value. We had a team
8 of evaluation experts -- Robert Charles Gleicher was engaged to
9 value the underlying real estate. We had a team of Cambridge
10 associates to translate that real estate value into the value
11 of the loan. We had an expert of Park Bridge Associates who
12 provided us some advice about what that loan might have been
13 worth in the dynamics of the market as it existed in 2000 --
14 September of 2008 for these highly illiquid properties.

15 We also, along the time of liquidating this
16 portfolio, have had advice from other real estate professionals
17 and have actually transacted some of the properties, so we had
18 a pretty good sense of what the properties were worth. The
19 settlement value of \$490 million represents a discount from a
20 full-out; our value being accepted as a hundred. But it's
21 within a very reasonable range of what we thought we would come
22 out in a fully contested hearing before Your Honor and
23 valuation. As Your Honor has said many times valuation is, you
24 know, somewhat of an art not a science, and it would have been
25 a substantial debate. It would have taken many weeks to try

1 the case and we believe that that resolution of the claim is
2 fair and reasonable and a reasonable exercise of business
3 judgment.

4 Resolution of the claim under the master repurchase
5 agreement drove resolution of the claim under the net worth
6 maintenance agreement -- a function of what value is realized
7 under that claim drove what the net worth maintenance was of
8 the entity. Under the net worth maintenance agreement LBHI had
9 effectively guaranteed that Lehman RE would have a net worth of
10 \$100 million, a positive net worth of \$100 million. There was
11 -- issues were raised about whether or not this was an
12 enforceable guarantee under the double dip theory that Your
13 Honor has heard before in this proceeding and the threat of
14 substantive consolidation. From the Lehman RE perspective the
15 guarantee was given for purposes of compliance with Bermuda
16 regulatory requirements for an insurer doing business in
17 Bermuda and we thought it was a pretty good position that the
18 guarantee would be enforceable. However the accepted claim
19 amount, the \$450 million, again represents a discount from a
20 full-out win, recognizing that there was litigation risk and
21 time and expenses associated with resolution of that claim in a
22 contested hearing. So both of those two features we believe
23 were -- have been settled at reasonable prices reflecting the
24 reality of litigation risk and the time and expense that it
25 takes to achieve that.

1 With respect to the sale of the five properties back
2 to LCPI, again the \$32 million price is, by all the information
3 available to the provisional liquidator, at or near fair market
4 value for those properties. Again, it's based on the work of
5 our experts and the other real estate advice that the
6 provisional liquidator has received throughout the course of
7 this proceeding. It is also fair to say that liquidation of
8 these properties is a business goal of the estate in any event.

9 The other subsidiary benefit of selling the property
10 back -- and it's not an insignificant benefit to the properties
11 -- 237 Park Avenue and Pacific Point, were the subject of
12 substantial litigation. The 237 property litigation is before
13 Your Honor and it relates to whether or not a guarantee of that
14 loan given by Broadway Partners was released as part of a
15 settlement before Your Honor with -- between LBHI and Broadway
16 Partners, I think in the summer of 2009. That litigation has
17 been pending for about a year. To pursue that litigation again
18 would have been an extensive and expensive process. As part of
19 the settlement, that litigation is resolved with no additional
20 expense to the estate.

21 The second piece of litigation relates to the SunCal
22 bankruptcy and the Pacific Point property. We're one of some
23 20 properties in which the SunCal debtors sought to equitably
24 subordinate our lien. As part of this settlement we -- the
25 Lehman RE estate has extricated from that litigation, and in

1 effect Lehman Ali and LBHI become the party Defendants and have
2 the associated expense of dealing with that litigation. So,
3 from our perspective the value of the properties were sold at
4 fair market value and resolution of a litigation is an added
5 substantial benefit to selling the properties back to LCPI.

6 There are certain other minor aspects of it -- there
7 was a claim relating to the residential portfolio at the
8 default date Aurora, the servicer of the residential portfolio,
9 had accumulated principal and interest that had been received
10 from the underlying borrowers. Payment was made to Lehman RE
11 estate of approximately \$20 million. There was a \$4.4 million
12 balance in which Lehman RE claimed that it was entitled to;
13 LBHI claimed it was entitled to, depending on the timing of the
14 payments. This settlement also resolves that dispute as well.

15 So, Your Honor, for those are the principal
16 components of the settlement, but for all of those reasons we
17 believe it is a fair exercise of business judgment and fair and
18 reasonable settlement from the point of the Lehman RE estate.

19 THE COURT: Thank you very much.

20 MR PETRICK: Thank you, Your Honor.

21 THE COURT: Does anyone else wish to say anything?

22 I'm satisfied based upon my review of the papers that
23 have been submitted, both in support of the debtors'
24 application for approval of the settlement and the parallel
25 application brought on behalf of the fine representatives of

1 Lehman RE that the transaction, which is a comprehensive one
2 and which has been described in at least general terms by
3 counsel, is in the best interests of the Chapter 11 estates and
4 also in the best interests of the Chapter 15 debtor. Moreover,
5 approval of the transaction in Bermuda is a strong indication
6 that, at least from the perspective of the Bermuda proceeding,
7 approval of the transaction makes good sense and would be
8 consistent with the obligations this Court has under Chapter 15
9 of the Bankruptcy Code. For those reasons, and notably because
10 this is uncontested and represents the product of good faith,
11 arms-length negotiations over an extended period of time by
12 sophisticated parties, the transaction is approved.

13 MR. PETRICK: Thank you, Your Honor.

14 (Whereupon these proceedings were adjourned until 2:00 PM)

15 (Thereupon the proceedings continued.)

16 THE COURT: Be seated, please. Good afternoon.

17 Mr. Slack, how are you?

18 MR. SLACK: Very well, Your Honor. Good afternoon.

19 Your Honor, we're here this afternoon; the first
20 matter on is the Michigan State Housing Development Authority
21 versus Lehman Brothers Derivative Products, Inc., adversary
22 proceeding which is 09-01728. And we are here for a pre-motion
23 conference, Your Honor, where the parties have after some
24 discussion agreed subject to Your Honor's approval of the
25 schedule to brief what are probably the primary issues relating

1 to the derivative transactions between the parties. And so we
2 have after some discussion set out a proposed briefing schedule
3 on what is effectively Lehman's counter-claims to the original
4 complaint. And maybe, Your Honor, I can just take two minutes
5 and go through the procedural history just to put everything in
6 framework.

7 The complaint was filed in November of 2009 --

8 THE COURT: Mr. Slack, I'm interested in having you
9 do that, but --

10 MR. SLACK: Okay.

11 THE COURT: -- the real focus on for me this
12 afternoon is why summary judgment makes sense in this case.
13 What's happened in the six months since the District Court
14 denied the Michigan State Housing Authority motion to withdraw
15 reference because six months have gone by and this is the first
16 I'm seeing you. I'm also frankly troubled by the fact that
17 this is an exceptional case in that it is one of the few cases
18 I'm aware of in the mediation program that has resulted in a
19 failure to reach an agreement. I don't want to go into the
20 substance of that, but I'd like to know whether or not the
21 passage of time may have made this a case that may be
22 susceptible to mediation before everybody does all this work.
23 Just because it failed once doesn't mean that it is a dispute
24 beyond the ability of reasonable people to reach compromise.

25 MR. SLACK: Those are all accurate and fair points.

1 Let me address what's on Your Honor's mind.

2 Since the motion to withdraw the reference was
3 denied, frankly the parties have not taken any steps until this
4 time to do anything. So there's been no discovery. I think
5 the parties spoke at some various times, but recently upon
6 discussion it was, let's see if we can tee up the primary
7 issue.

8 Along the lines is your question about settlement.
9 Let me say the following; there haven't been any subsequent
10 discussions about settling the entire case. There have been
11 recently some discussions about settling the affirmative claims
12 of MSHDA and the parties have agreed to discuss those,
13 essentially separate them. I think the original mediation was,
14 let's see if we can put everything together and settle it all
15 as one package. That didn't work, and now the idea is maybe if
16 we separated out their -- it's possible to settle one or both
17 pieces. And so we have agreed to discuss the affirmative
18 claims which is why those are not going to be subject of
19 summary judgment, at least with respect to this application.

20 I can tell Your Honor we are open to continuing
21 settlement discussions on the other piece, and if there's an
22 appetite for doing so, we certainly wouldn't shun those. We
23 would be happy to continue, and Your Honor has, I think,
24 because it's public, essentially, the overall number is not in
25 any particular case, but, you know, the success rate for the

1 ADRs is one that's been remarkable and this is one of the cases
2 that was not able to settle in mediation.

3 THE COURT: Well, as an outlier, I frankly think
4 that the parties have an even higher burden here of
5 demonstrating that it makes sense to proceed with expensive and
6 burdensome litigation. Under the present circumstances I do
7 not understand what makes this case different from all the
8 others that are of like type. And that's really a question for
9 Michigan State Housing Authority to answer at some point.

10 MR. SLACK: So let me, Your Honor, say this, is that
11 -- and then I'm going to turn it over so you can ask your
12 questions. Is it, you know, to the extent that Your Honor
13 approves going forward, we have a schedule that we think makes
14 sense with the other party. If Your Honor would like to see if
15 the parties can, you know, take two weeks, three weeks, a month
16 and discuss things, I can tell you again we have approached
17 them with respect to a part and we're happy to expand that and
18 see if there's any room for discussion of the entire case or in
19 pieces. And so we would be open to that, but if Your Honor
20 does approve it, we would recommend the schedule that the
21 parties have agreed to.

22 THE COURT: I'm not going to interfere with the
23 schedule, but I do have two independent related questions. The
24 first question is what makes this the matter ripe for summary
25 judgment, and am I going to be met at some point with an

1 argument, well, this fact or another fact that will be the
2 subject of discovery that will in effect delay resolution. So
3 since I know nothing about the issues to be presented in the
4 motion for partial summary judgment other than the fact that
5 the parties seem to think that this is an approach that works
6 and has developed a schedule to allow it to work, I'd like to
7 know more about what makes this ripe for summary judgment such
8 that I can exercise my appropriate gatekeeper function which
9 the stipulation purports to take away from me. So that's
10 question one.

11 And question two is why are you doing this now as
12 opposed to getting back to the table where presumably if it
13 were possible to exercise reasonable business judgment, parties
14 could make an agreement comparable to the agreements made in
15 virtually every other case of like type. So question one is
16 clear and question two is what makes this case different from
17 all the others.

18 MR. SLACK: Yup.

19 THE COURT: It may not be.

20 MR. SLACK: Would you like me to discuss a little
21 bit about the subject matter or would you like to talk to
22 Michigan State Housing where --

23 THE COURT: Let's deal with each question separately
24 --

25 MR. SLACK: Okay. So --

1 THE COURT: -- and I guess I'd like to know why the
2 parties think that summary judgment is appropriate. If it is
3 believed that summary judgment if it could be achieved would
4 facilitate a resolution of everything, that would be one
5 approach. But I'd like to know why the parties believe that
6 summary judgment on a partial basis is an efficient way to see
7 (indiscernible 14:13:14).

8 MR. SLACK: So, Your Honor, the answer to that is
9 that with respect to the counter-claims, it really centers
10 around one issue and one clause. So Michigan State Housing and
11 LBDF had entered into a number of interest rate swaps, and
12 those swaps had a particular provision that I wouldn't say is
13 unique to it, but let's say rare in these swaps, at least to
14 the overall portfolio, which is that upon an early termination
15 what it says is that the early termination amount that gets
16 paid is determined based on a mid-market formula. And after
17 the LBHI bankruptcy, what the parties did here was instead of
18 having these terminate and paid at the mid-market amount, the
19 parties agreed to essentially have this assigned from LBDF to
20 LBSF, and that happened after the LBHI bankruptcy.

21 So there was an assignment agreement, and that
22 assignment agreement had a particular clause in it that I'm
23 going to paraphrase as follows, but I'm happy to hand up to you
24 because I have a copy. It essentially says, Your Honor, that
25 in all circumstances other than a circumstance where LBSF goes

1 into bankruptcy, you continue to determine the amount of the
2 payment upon an early termination based on a mid-market amount.
3 But upon a Lehman bankruptcy, an LBSF bankruptcy, that amount
4 gets determined according to what I'll call the more typical
5 market quotation methodology that's in the ISDA. It's our
6 view, Your Honor, that that is an ipso facto clause, much the
7 same way we've litigated those issues before Your Honor in both
8 Metavante, BNY, and Ballyrock (phonetic). Obviously the clause
9 is different. Here the effect is in some ways very similar.

10 THE COURT: I take it that the change in the formula
11 for determination would result in less money coming to Lehman.

12 MR. SLACK: That's right. In this case, Your Honor,
13 it's somewhere in the range of \$23 million.

14 THE COURT: That's the spread?

15 MR. SLACK: That's the spread.

16 THE COURT: So we're fighting here over \$23 million?

17 MR. SLACK: I'm sorry?

18 THE COURT: I don't mean to make it sound like it's
19 not a lot of money, but we're fighting here over \$23 million?

20 MR. SLACK: That is the amount, Your Honor.

21 THE COURT: Okay. In the context of this case, that
22 is not a lot of money.

23 MR. SLACK: That -- Your Honor, that is the amount,
24 though, and that is where we are.

25 THE COURT: And this has been going on since 2009.

1 MR. SLACK: So in 2009, Your Honor, as Your Honor is
2 aware we -- that's when it was filed, and we took the better
3 part of 2010 in mediation; 2011, the better part of that was on
4 the motion to withdraw, and now we filed an amended set of
5 counter-claims, and that's where we are.

6 THE COURT: Okay. It seems to be a case that is
7 characterized by frolics and detours and a refusal to get to
8 yes. And that's really, I think, a good time to hear from
9 Michigan State Housing Authority, because maybe outlay why
10 you're here.

11 MS. EWART: Good afternoon, Your Honor. My name is
12 Lisa Ewart, I'm with the law firm of Wilmer, Cutler, Pickering,
13 Hale & Dorr. My application for a pro hac motion was filed
14 yesterday.

15 THE COURT: Deem it granted for today's purposes.

16 MS. EWART: Thank you, Your Honor. I represent
17 Michigan State Housing Development Authority, and I think if
18 you could just permit me a minute or two to give a little bit
19 more factual background, I think it would be helpful in
20 explaining why this case is different and why this case makes
21 sense to go forward on summary judgment.

22 So MSHDA did file in 2009. Initially when MSHDA
23 filed, it was over an erroneous payment or MSHDA submits was an
24 erroneous payment that was made to LBDP, which was the original
25 party with MSHDA under the ISDA agreement. As Mr. Slack

1 explained, although one slight difference -- under the original
2 ISDA agreement, if a bankruptcy filing by LBDP or LBSF had
3 happened, then you would have gone forward with the normal
4 market quotation, calculation of damages. However under a
5 schedule attached to the ISDA agreement, if LBHI filed, then
6 you would have this mid-market theory that Mister -- excuse me
7 -- mid-market approach that Mr. Slack explained.

8 LB -- as you know, LBHI filed first. Lehman
9 representatives approached MSHDA and said, look, you know,
10 instead of going forward as how the schedule would have us go,
11 let's enter into this assignment agreement which I think all
12 parties found was beneficial. Under that assignment agreement
13 as he mentioned, in the event that LB -- at this point, LBFS is
14 now the counter-party, not LBDP; they are out of it. If LBFS
15 filed for bankruptcy, then we would do the normal market
16 quotation under the ISDA agreement, similar to how it would
17 have been structured had LBDP filed initially. And now,
18 obviously, LBHI is out of it. However, if for any other reason
19 other than failure to pay or bankruptcy, then we would go back
20 to the mid-market theory.

21 LBSF filed for bankruptcy on, I believe, October 3.
22 On November 5, MSHDA terminated under the assignment agreement
23 under the market quotation because it was in a vote of LBSF
24 filing for bankruptcy. MSHDA paid the calculation amount,
25 which I think in there was around -- excuse me -- \$20 million.

1 Then within the proper amount of time, the Lehman entities
2 answered MSHDA's complaint and LBSF filed counter-claims for
3 breach of contract and unjust enrichment. At that point, they
4 did not raise the ipso facto issue.

5 The Court, through the mandatory mediation process,
6 ordered ADR I believe at some point in 2010. The parties, you
7 know, as the mediator found engaged in good faith resolution,
8 or good faith mediation of the issues. We exchanged documents,
9 we exchanged mediation statements, we engaged in mediation.
10 The one issue that changed, I think, in between the time that
11 MSHDA -- or excuse me -- that Lehman originally answered, and
12 then we have the mediation, was this Court's decision in BNY
13 Trustee. And I do not profess to be in complete understanding
14 of the facts of that case. It was quite a complicated
15 transaction, but in MSHDA's position, we think that -- you
16 know, and our views have changed on this -- but we think not
17 only we have differing opinions as to the implications of BNY
18 on this case, and we have different understanding of what BNY
19 means. And I think the sticking point for the parties here,
20 unfortunately, is, you know, we can't come to an agreement on
21 what that means. And if we are correct and it was not an
22 invalid ipso facto clause, if instead the liquidation of the
23 swap agreement under the assignment agreement is protected by
24 the safe harbors, then we're pretty much done. We've got
25 MSHDA's affirmative claim for the, I believe, it's around \$2

1 million that was in MSHDA's mind was erroneously sent over to
2 LBDP, who at the time that received that money was not even a
3 counter-claim -- a counter-party to the swap, and, you know, I
4 think that can certainly be easily resolved by the parties.
5 But where we're sticking is, you know, a claim by Lehman for
6 \$23 million which for my client which is a public housing
7 authority, \$23 million is a lot of money. And either we're
8 right or we're wrong about the implications of BNY Trustee and
9 whether or not what we did was protected by the safe harbor.

10 But if we're right, then, you know, that's money that
11 we can save for our client. And so I think without going into
12 the details of the mediation as obviously those are
13 confidential between the parties, but, you know, my
14 understanding is really that sticking point is that one issue
15 of law. And in, you know, we can certainly --

16 THE COURT: Is that the issue of law that is going
17 to be the subject of the motion for summary judgment?

18 MS. EWART: It's our belief, and as I think all
19 parties represented to the District Court during the motion to
20 withdraw the reference hearing, that is the issue that's sort
21 of the sticking point here that I think can resolve Lehman's
22 counter-claims, and then once those are resolved, I think we --
23 the parties as Mr. Slack mentioned -- I think that the parties
24 can reach agreement on MSHDA's affirmative claim.

25 So, yes, so the idea here is to try to get before

1 this Court that issue of law. The parties, you know -- there
2 will be other things that are discussed in the summary judgment
3 brief because we have to be able to show why that issue of law
4 then dictates the, you know, that we prevail or that they
5 prevail on Lehman's counter-claims, and we do feel like that
6 issue which I think can be streamlined and efficiently
7 presented to this Court will allow the parties to then go
8 forward and reach an agreement. But until then, I fear that
9 we're sort of at this very challenging point where they have
10 one idea about whether this was protected to the safe harbor.
11 We have an absolute separate idea. And if we're right, we
12 don't owe them any money, and if they're right, we do.

13 And, again, my client is a -- he's a public entity.
14 This is a lot of money to my client, and we think that it can
15 be efficiently and quickly presented to the Court for summary
16 judgment.

17 THE COURT: Okay. I guess what I'd like to clarify
18 from Mr. Slack who is familiar with the issues in what I
19 personally refer to as the perpetual case --

20 MS. EWART: I apologize.

21 THE COURT: -- whether or not in fact this is going
22 to be a summary judgment that will in effect re-litigate issues
23 that were decided in the context of perpetual in Ballyrock.

24 MS. EWART: I would like to respond to that question
25 as well, Your Honor, once Mr. Slack has an opportunity.

1 THE COURT: I'm not going to prevent you from doing
2 that. I just wanted to ask Mr. Slack that question because you
3 indicated a lack of full familiarity with the facts are in that
4 earlier case.

5 MS. EWART: Yes, Your Honor.

6 MR. SLACK: So, Your Honor, the best way to answer
7 that I think is that we think in many ways this is an easier
8 decision than the one in perpetual and Ballyrock, and the
9 reason for that is is that you don't have to worry in this
10 matter about whether it is an ipso facto, because in that case
11 you had, if you remember in perpetual and in Ballyrock, there
12 were arguments that the bankruptcy of LBHI was the trigger for
13 the ipso facto and therefore we had argued as Your Honor is
14 well aware a number of arguments that, you know, that said that
15 that didn't matter for purposes of ipso facto law and Your
16 Honor has ruled on that. Here we have a bankruptcy -- the
17 bankruptcy event is LBSF's bankruptcy. It's clear it's LBSF's
18 bankruptcy, so you don't have that issue at all. So in some
19 ways, it's an easier case. We think that the ruling with
20 respect to the safe harbors that was made in both the perpetual
21 matter and Metavante, for that matter, and Ballyrock will
22 essentially control the outcome here, and I recognize that my
23 colleague is going to disagree with me on that. But we would
24 argue that the same construction of those safe harbors that
25 were rendered in those cases would, you know, would answer the

1 question here.

2 So, you know, in our view, this is an easier case
3 than perpetual but I do recognize, Your Honor, that, you know,
4 that those cases had different clauses that we were trying to
5 invalidate; the flip clause while it is somewhat related to and
6 can argue it's analogous to in some ways the clause here on
7 methodology of payment, it is obviously a different clause.

8 THE COURT: Okay. Go ahead.

9 MS. EWART: Thank you, Your Honor. We do believe
10 this is an easier case than BNY but I think we unsurprisingly
11 come out to being that it's easier in the sense that you would
12 find in our favor.

13 As I understand BNY there was a separate agreement
14 that contained the flip provision that changed the property
15 that Lehman would or wouldn't get in the event that the swap
16 was terminated. Here there's no question but that the
17 assignment agreement is part of the swap agreement and that you
18 don't have to worry about that second issue of whether or not
19 this is a totally separate, not a swap agreement.

20 Second, Your Honor, I think that here we have the
21 termination and calculation of settlement amount, and without
22 going into the merits of what we'll say on summary judgment
23 which we are prepared to file, we would submit that the
24 liquidation which is part of the safe harbor, is exactly what
25 it means to terminate and calculate settlement amount. And,

1 Your Honor, without fully understanding Lehman's position on
2 these issues, because obviously we've, you know, had some
3 discussion. We've gotten a hint of what they will argue both
4 at the motion to withdraw the reference and also when they
5 sought leave before Your Honor to amend their counter-claims,
6 we would submit that the part of your decision in BNY that is
7 being relied on is, you know, a clause where Your Honor
8 mentioned the alteration of rights as they exist. We have a
9 way that we would distinguish that that is just not applicable
10 to our situation here. But even setting that aside, if it's
11 the alteration of rights that then exist that vitiates the
12 protections of the safe harbor, then we would submit that
13 there's no protection in the safe harbor whatsoever.

14 So we do think that this case is different than BNY.
15 We do think this is easier to decide than BNY, and we would
16 appreciate the opportunity, Your Honor, to be able to move
17 forward and put our arguments in summary judgment. And as I
18 mentioned, I do think that the resolution of that issue of law
19 will go a long way towards getting the parties to where they
20 need to be. And without that resolution I don't see how
21 mediation can be successful.

22 THE COURT: So let me ask a question that is on my
23 mind but you should feel free not to answer if you think it
24 leads you into either revealing a client confidence or puts you
25 in a position that you consider unfair under the circumstances.

1 When your firm moved towards your other reference, that was
2 part and parcel of what I view as an attempt at forum shopping
3 to be able to argue certain issues that you assert would
4 distinguish your situation from the perpetual and Ballyrock
5 situation. By presenting those arguments to a District Court
6 judge that has no background whatsoever in the history of the
7 Lehman case, that to me suggests that there is a strong
8 likelihood that if I were to find in Lehman's favor with
9 respect to the pending motion, or the motion that you propose
10 to file, that your next step would be to take it to the
11 District Court and to have the hearing that you would have had
12 in the District Court if you had been successful in your
13 attempt to withdraw the reference in the first instance,
14 thereby leading to a proliferation of litigation and delay as
15 opposed to getting to a result. In other words, unless you
16 win, you're likely to appeal, which means that from the
17 perspective of case administration, this becomes, and pardon
18 the reference, vexatious litigation from the perspective of
19 Lehman, because you represent a client that doesn't want to pay
20 the money even if you owe the money, and you have an ability as
21 a matter of law to continue delaying the payment.

22 So my concern here is that permitting a summary
23 judgment isn't a means to an end to bring the case to a prompt
24 conclusion as much as it is a means to foster further delay.

25 MS. EWART: Your Honor, respectfully I disagree with

1 your understanding of the reason for withdrawing the reference,
2 but appreciate your thoughts.

3 THE COURT: It was forum shopping in my view and you
4 can disagree with that all you like. That's what it was.

5 MS. EWART: I understand your opinion, Your Honor.
6 I mean, yes, we would preserve all rights that our client has
7 and we think our client is correct on this issue of law. And
8 our client, as I mentioned, is a public entity, doesn't have
9 the ability to pay \$23 million if it is not legally required to
10 do so. And certainly if a Court determines, and we, you know,
11 don't have any appeal rights or we go through our appeal rights
12 and the Court determines that our client is required to pay the
13 money because our client has a wrong understanding of what the
14 safe harbor does --

15 THE COURT: What Court has to decide that?

16 MS. EWART: I think, Your Honor, that we would
17 ultimately reserve --

18 THE COURT: -- ultimately go where; the Supreme
19 Court of the United States?

20 MS. EWART: Your Honor, I think we would reserve our
21 appeal rights. And I do think that as Your Honor is well
22 aware, as your parties get more information as to whether their
23 understanding of the law is correct or not correct, it does
24 help push settlement forward. But I can't at this point tell
25 you that if you rule against us, that we won't exercise our

1 appeal rights and that --

2 THE COURT: I fully expect that you will. It was
3 one of the reasons that I raised the question. It is unclear
4 to me whether or not given the parties the right to proceed by
5 summary judgment at this point is a means to expedite the
6 litigation or a means to extend and prolong the litigation.
7 That's the point of the question, and that's why I have asked
8 you the somewhat convoluted question that I have about the
9 nature of your client and your client's long-term objectives.
10 It seems to me that your client's long-term objective is to
11 prolong for as long as one possibly can having to pay an
12 obligation that may in fact be doing harm. And that it may be
13 more politically expedient for Michigan State Housing Authority
14 not to pay in any particular year than it is to pay in a
15 particular year. And that for that reason, mediation has
16 failed because private litigants can exercise in forum judgment
17 on a risk adjusted basis to determine what the likelihood is of
18 ultimate success and can make business judgments. It's not
19 clear to me that your client can or will.

20 MS. EWART: Your Honor, I think my client's
21 objective is to get back the \$2-something million that was
22 erroneously transferred from its accounts over to LBDP, a party
23 that was not even a party to the swap agreement.

24 THE COURT: We had a discussion about this point in
25 2010, other lawyers were present, and I raised the question as

1 to why the rule party who apparently committed this error
2 wasn't even put into the litigation, and nobody fully answered
3 that question to my satisfaction at the time.

4 MS. EWART: Your Honor, I believe that they are a
5 defendant in this litigation. LBDP is a defendant in this
6 litigation. LBSF is the defendant that's brought the counter-
7 claims --

8 THE COURT: I think the Trustee was the party that
9 misapplied the funds.

10 MS. EWART: The Trustee transferred the funds from
11 MSHDA's account to LBDP's account, that LBDP is the entity that
12 holds the money and that requested that transfer.

13 THE COURT: Yes, but the Trustee was never named as
14 a defendant.

15 MS. EWART: That's correct. The Trustee is not a
16 defendant.

17 THE COURT: So the party that actually committed the
18 error that you're now complaining about isn't here to expunge
19 in respect of their error.

20 MS. EWART: Your Honor, we brought the action
21 against LBDP, that is my client's objective, to get that money
22 back. Your Honor asked whether my client's objective is to try
23 and delay through summary judgment. I think the answer is no.
24 I think my client wants a clear answer from the Court as to
25 whether or not my client is required to pay additional money or

1 whether my client acted appropriately under the Bankruptcy
2 Codes -- or excuse me, acted appropriately under the contract
3 as protected by the safe harbors of the Bankruptcy Code. Your
4 Honor asked whether or not mediation will be effective. I
5 would like to hear, you know -- I would appreciate Mr. Slack's
6 thoughts on this point, but I think the answer is probably no,
7 because I think at the end of the day, the entities have a
8 fundamental disagreement of what the law requires and it's not
9 a factual dispute. It's a fundamental disagreement about what
10 the law requires, and if we are right that we're not required
11 to pay, then, you know, we would hope to get that ruling from
12 Your Honor. Your Honor may disagree with us. Your Honor may
13 review our summary judgment briefs and think we're absolutely
14 wrong, and in that case, we'll get a ruling from Your Honor,
15 that will be a point of information that my client can have and
16 can understand in its dealings with trying to resolve this
17 issue. If Your Honor rules in our favor, I think it's quite
18 likely that Lehman will appeal. And so I see Your Honor's
19 point that yes, there could be appeal practice here, but I
20 think until my client gets what is entitled to which is a
21 ruling as to whether or not it acted correctly under the law, I
22 think it's very challenging for us to be able to move forward
23 in mediation. We tried. We exchanged documents, we had
24 conversations with the principals, and we were unable to
25 resolve. And so I do think that makes this case different and

1 I do think that is why I think going forward on summary
2 judgment on this point would go a long way to one, giving my
3 client the, you know -- its -- what its entitled to which is a
4 legal judgment as to whether or not it acted correctly under
5 the law, and then also towards resolving the dispute.

6 THE COURT: Okay. Mr. Slack, anything more?

7 MR. SLACK: Your Honor, I just would -- I would just
8 point out what I think Your Honor already knows, and that is
9 that, you know, we've had a number of cases with counter-
10 parties where we've had vehement disagreements on the law and
11 been able to settle, and I don't want to get into the
12 specifics, but I think Your Honor knows that we are willing to
13 compromise and are here as well. So this is not a question of
14 us treating Michigan State differently than we have other
15 counter-parties, and we are prepared to sit down with them over
16 the next couple of weeks and try again. I don't know whether
17 that has any chance of success, but we're willing to do it.

18 THE COURT: I'm going to make the following
19 suggestion. I think that the parties have clarified, at least
20 for my purposes this afternoon, the status of the case, and
21 that was not evident from simply reading the letter submitted
22 on March 20 that proposed the schedule. It was lacking in any
23 detail as to what was going on and this was helpful.

24 I believe that what makes this case different from
25 other cases that were resolved and through the mediation

1 process is not the facts but rather the character of Michigan
2 State Housing Authority as counter-party, and the political
3 restraints that affect that entity. That's a perfectly
4 acceptable reason for counsel to suggest that mediation is not
5 likely to be successful.

6 I'm going to grant the authority to proceed by means
7 of summary judgment, but I'm going to propose that the summary
8 judgment papers be deemed mediation statements as well as
9 statements of legal position for the Court, and that prior to
10 argument with respect to this matter, that the parties return
11 to former Judge Mabey in his capacity as mediator assuming he's
12 willing to do it and the parties are willing to appear before
13 him again, given his familiarity with the issues, and to see
14 whether or not a risk adjusted approach to this may lead to
15 some productive compromise. I would simply note that the
16 Lehman case has been characterized throughout by parties of all
17 kinds including foreign administrators, foreign receivers,
18 fiduciaries for bond holders acting rationally and making
19 compromises based upon not every last piece of information that
20 might be available, but based upon a reasoned assessment as to
21 the likelihood of success or failure. I suspect that it would
22 be of some use if when we cut, would his client would act in a
23 similar way after the papers had been filed and with the
24 guidance of Judge Mabey.

25 So I'm going to propose that happen before we have

1 argument with respect to the pending motion. Is that
2 acceptable to the parties?

3 MR. SLACK: Your Honor, it's acceptable to us.

4 MS. EWART: Your Honor, it's acceptable to us as
5 well, if I could just have one point of clarification. So we
6 will go forward with filing, but we'll also then submit that
7 filing as mediation statements.

8 THE COURT: All I'm suggesting is the very -- so you
9 don't have to duplicate your effort, the papers that have been
10 prepared and filed in support of the motion for summary
11 judgment in an opposition to the motion for summary judgment
12 would function as what is really in substance a supplemental
13 mediation statement which would inform a discussion that you
14 could then have with the aid of Ralph Mabey and hopefully that
15 will produce an environment in which your client in particular
16 may recognize the wisdom of acting rationally. You don't have
17 to act rationally. You can take an all-or-nothing position.
18 And you can take the position that unless and until this legal
19 issue is finally resolved by some court, whatever that court
20 may be, to your satisfaction that you're not going to pay,
21 that's your legal right. But presumably, there are business
22 judgments that will be made along the way. This is one of the
23 points along the way.

24 MS. EWART: Thank you, Your Honor.

25 MR. SLACK: Thank you, Your Honor.

1 THE COURT: Okay.

2 MR. SLACK: Your Honor, I believe that the order was
3 submitted by disc this morning, and if it was --

4 THE COURT: I'm sorry. What about the order?

5 MR. SLACK: I believe -- I believe that the order
6 was submitted on the disc that was submitted this morning. If
7 that's not the case -- at least that's my understanding; right?
8 Correct. Okay. That's what I understand.

9 THE COURT: When you say the order --

10 MR. SLACK: We had a proposed order with the
11 schedule that was --

12 THE COURT: Oh, the scheduling order?

13 MR. SLACK: -- of the scheduling order, and so we
14 had --

15 THE COURT: Assuming that we still have that disc,
16 it will be entered in due course.

17 MR. SLACK: Okay. Thank you, Your Honor.

18 THE COURT: And if we need it, we'll contact you to
19 get another copy.

20 MR. SLACK: Great. Thank you.

21 MS. EWART: Thank you, Your Honor.

22 MR. MAJOR: Good afternoon, Your Honor. Chris Major
23 of Meister, Seelig & Fein. I represent the non-debtor entities
24 in the next three matters that are on.

25 THE COURT: Uh-huh.

1 MR. MAJOR: It's numbers 5, 6, and 7.

2 THE COURT: These are on for status conference.

3 MR. MAJOR: They are, Your Honor. We were last
4 before Your Honor --

5 THE COURT: What's the status?

6 MR. MAJOR: Here's the status, Your Honor. We were
7 last before Your Honor about a month ago. There was motions to
8 dismiss that were argued, and at the conclusion of those
9 arguments Your Honor directed the parties to discuss potential
10 settlement, and failing that, then to discuss whether the
11 parties were willing to mediate. And as Your Honor put it, if
12 the parties couldn't agree on mediating, you would likely order
13 it when we came before you today. The parties did have those
14 settlement discussions and while they didn't result in an
15 agreement on settlement, they did result in an agreement that
16 we should of course work towards identifying a mediation
17 procedure and the parties have done that. The parties have
18 agreed to go to JAMS. We've actually identified the specific
19 arbitrator, it's retired Justice Crane of JAMS who will --
20 excuse me, mediator -- and he'll be the mediator. We've
21 narrowed down dates for the latter half of May which we'll be
22 confirming with Justice Crane's secretary at JAMS. And so
23 we're proceeding toward mediation at the end of May. And
24 that's where the status on that is.

25 And then there's one other point that I'd like to

1 update the Court on. We don't need the Court's intervention at
2 this point, but I think it's fruitful to let Your Honor know
3 about this. We've been discussing a discovery schedule for a
4 period of time now as the case has kind of adapted over the
5 last few months with amended pleadings, the argument, and now
6 the fact that we're going to mediation. And in an attempt to
7 balance competing interests of not expending unnecessary
8 resources on e-discovery, for example, while you're getting
9 ready for hopefully a fruitful mediation, with the idea of
10 keeping the pressure on the parties and that expense having to
11 hang over their head may be forcing a settlement. We've
12 discussed, and we haven't hammered this out yet, but setting a
13 deadline for the production of these e-discovery documents that
14 is a sufficient time after the scheduled mediation session such
15 that the parties would not have to be reviewing documents
16 around the clock between now and the mediation that as Your
17 Honor knows very great expense. So we would propose -- we
18 still have some discussions that have back-and-forth on the
19 details -- but we could submit an order to Your Honor that
20 would give the parties a cushion so to speak so that they could
21 focus on the mediation, and if the mediation fails, there is a
22 schedule in place for litigation if it becomes necessary.

23 THE COURT: Okay. One of the issues that I recall
24 from the argument on the motion to dismiss touches on the scope
25 of discovery because of the claims based on, I'll use the

1 buzzword "fraud". Have the parties reached any agreement
2 concerning the scope of discovery in connection with this so-
3 called protocol?

4 MR. MAJOR: I have to give Your Honor a "yes, but"
5 answer. The answer is yes, but frankly that agreement was
6 reached before the oral argument on the motion to dismiss. So
7 we had agreed on the scope on search terms. In fact, the
8 parties have already collected and have in their respective
9 databases the documents that are to be reviewed and produced.
10 So there was an agreement but it did frankly occur before we
11 were last here in this court.

12 THE COURT: So what does that mean from the
13 perspective of Lehman?

14 MR. MCCARTHY: Your Honor, what that means -- Ed
15 McCarthy on behalf of Lehman Brothers, Your Honor. Thank you.

16 What that means is that we did agree to search terms,
17 and what we did as an accommodation -- and I think this would
18 go for Mr. Major's side, too -- there was accommodation with
19 respect to search terms, with respect to documents that were
20 pulled from our own clients. So as an accommodation, we agreed
21 to pull documents that related to the buzzword that you've
22 used, the fraud claims. We've pulled those documents, we're in
23 the process of reviewing those documents, but we have not
24 reached an agreement on producing those documents. We also
25 haven't reviewed all of those documents.

1 So I think the major point that -- the major point
2 here is Lehman would not want to review all of those documents
3 its already collected, and certainly not produce all of those
4 documents which we view as irrelevant to this case. So I think
5 there is much more work to be done, although both parties have
6 done quite a bit of work and have worked together to reach
7 agreement on search terms and to reach agreements on -- we were
8 almost there, reaching an agreement on the production dates,
9 Your Honor, which is really the start date for the rest of the
10 schedule. And now that we've come to an agreement on mediation
11 which I think is excellent, and my client is certainly hopeful
12 that this mediation will be fruitful, the parties are in a
13 little bit of a different position on where we go with the case
14 in discovery while the mediation is going forward.

15 THE COURT: So, in reference to this issue, is there
16 a need to resolve the scope of discovery prior to mediation or
17 is it something that can simply be put to one side?

18 MR. MCCARTHY: I think requiring Your Honor to
19 resolve the scope of discovery before mediation is not
20 necessary. However, I think that will certainly be a point
21 that will come about after mediation, what --

22 THE COURT: If mediation is successful, this is all
23 moot. If mediation is unsuccessful, we're going to be back to
24 a status conference at which we'll talk about the timing of a
25 decision with regard to the pending motion to dismiss. I have

1 I believe communicated my views concerning the pending motion
2 to dismiss without actually ordering on it. And that will
3 probably lead to predictable results with respect to the scope
4 of discovery as well. Rather than get into the merits of any
5 of this now, I'm simply going to encourage the parties to have
6 a productive, good faith effort at resolving all of these
7 disputes through mediation and hopefully will succeed. If you
8 don't succeed, we'll deal with the consequences of that.

9 MR. MCCARTHY: Thank you, Your Honor, and to
10 clarify, one point that we do want to understand is what should
11 the parties do with their discovery efforts in the meantime,
12 which we don't -- we are -- neither of us believe that there
13 will be necessarily any productions before the mediation. What
14 my client would like is to move forward with the discovery
15 process which requires a lot of internal work in the meantime,
16 and not move forward at a bulldozer speed or at an aggressive
17 speed, but to move forward so that both parties are in a
18 position, assuming the unfortunate assumption that mediation
19 doesn't result in a fruitful resolution, that we're not back to
20 square one again, and that we haven't lost all this time out of
21 just sitting back on our laurels while we're waiting a month to
22 mediate.

23 So we would ask that the parties are able to get
24 together and try to reach an agreement on a date of a
25 production that is, while it's after the mediation, is within a

1 timeframe, whether it be a month or a month-and-a-half after
2 the mediation that the parties can move forward towards that
3 date in the meantime. And what that will do is allow the
4 parties to have the incentive to settle this matter as opposed
5 to sitting back on their laurels, and also allow us that,
6 again, in the unfortunate situation that we aren't able to
7 reach a resolution, we're able to move forward in the case and
8 not be where this case has been numerous times before, with
9 start and stops.

10 THE COURT: Well, I appreciate what you're saying,
11 but my view of this is that the only discovery that should be
12 taking place between now and the mediation is that discovery
13 which is either necessary or desirable to advance the causes of
14 the mediation, and that to the extent that the mediation proves
15 to be unsuccessful, I'll be determining the scope and pace of
16 discovery. You don't have to worry about prepping for it now.

17 MR. MCCARTHY: Thank you, Your Honor. I understand
18 the position.

19 THE COURT: Okay.

20 MR. MCCARTHY: What we will plan to do then moving
21 forward with your blessing is contact former Judge Crane's
22 office this afternoon, finalizing that date, and moving forward
23 with the mediation.

24 THE COURT: Great. Okay.

25 MR. MCCARTHY: Thank you, Your Honor.

1 THE COURT: I think that's the only other matter --
2 we've now completed the afternoon calendar --

3 UNKNOWN SPEAKER: Yeah.

4 THE COURT: -- and we're adjourned until 4 o'clock
5 when I have a matter on another case.

6
7 (Whereupon these proceedings concluded at 2:51 PM)

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I N D E X

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C E R T I F I C A T I O N

I, Donald Cohen, certify that the foregoing transcript is a
true and accurate record of the proceedings.

Donald
Cohen

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